IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-782

GATEWAY COAL COMPANY,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The temporary restraining order issued by the District Court for the Western District of Pennsylvania (App. A, pp. 1a-4a)[1] is reported at .. F. Supp. .., 80 LRRM 2633. The District Court's memorandum and order (App. B, 5a-10a) converting the temporary restraining order into a preliminary injunction is reported at .. F. Supp. .., 80 LRRM 2634. The opinion

1. The opinions and orders of the District Court and Court of Appeals and the umpire's decision and award are printed as appendices to the Petition for Writ of Certiorari and have not been separately reprinted in the Appendix. They are hereafter designated as "App. .., p. .." The designation "A. .." refers to the printed Appendix filed pursuant to Supreme Court Rule 36.

of the United States Court of Appeals for the Third Circuit (App. C, pp. 12a-24a) is reported at 466 F.2d 1157.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1972 (App. D, pp. 25a-26a). A petition for rehearing, timely filed, was denied on August 30, 1972 (App. E, pp. 26a-27a). The Petition for Writ of Certiorari was filed November 28, 1972, and was granted February 26, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was by virtue of 29 U.S.C. §185.

QUESTIONS PRESENTED

1. Does the strong federal policy favoring arbitration of industrial disputes apply to safety disputes or is there a presumption that safety disputes are not arbitrable?

2. Does a federal court have authority under *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), to enjoin a strike over a safety dispute and order arbitration of the underlying dispute or is the *Boys Markets* decision limited to economic disputes not involving safety?

3. Where a union relies upon the "abnormally dangerous conditions" provision of Section 502 of the Labor-Management Relations Act as justification for a work stoppage, must it present ascertainable, objective evidence to support its contention that its members

have a good faith belief that an abnormally dangerous condition exists or is it sufficient for the union merely to present evidence that the employees believe such a condition exists?

4. Does the protection of Section 502 of the Labor-Management Relations Act extend to employees not physically located at or near an alleged abnormally hazardous condition for work?

STATUTES INVOLVED

This case involves the interpretation and application of Sections 203(d), 301(a) and 502 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136 et seq. U.S.C. §141 et seq. (hereinafter "the Act"). They are printed in Appendix F to the Petition for Certiorari at pp. 27a-28a.

STATEMENT OF THE CASE

Petitioner, Gateway Coal Company, ("Gateway") is the owner of a large underground coal mine known as the Gateway Mine, which is located in Greene County, Pennsylvania. The Gateway Mine is one of the largest, cleanest mines in the nation, with an excellent safety record (R.[2] 20, 147).

For many years, the approximately 550 production and maintenance workers employed in the Gateway Mine have been represented for purposes of collective bargaining by the United Mine Workers of America (the "UMW"), its administrative division, District No. 4, United Mine Workers of America ("District 4") and Local Union No. 6330 ("Local 6330"). At all times material to these proceedings, the collective bargaining agreement in effect between the parties was the National Bituminous Coal Wage Agreement of 1968. (P. Ex. 1; R. 185-211). The "Settlement of Local and District Disputes" provision of that agreement contains a detailed grievance procedure and a broad arbitration clause which provides for compulsory, final and binding arbitration of "differences between the Mine Workers and [Gateway] as to the meaning and application of the provisions of [the] agreement . . ." and ". . . differences . . . about matters not specifically mentioned in [the]

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2. Two almost identical appendices (except for page numbers) were filed with the Court of Appeals, one by the United Mine Workers and its District No. 4 and the other by Local No. 6330. By agreement of the parties and for the convenience of the Court, the Appendix filed by Local No. 6330 has been designated as the record and all references to it in this brief will be cited as "R. . . . . "

agreement . . ." and ". . . any local trouble of any kind [arising] at the mine . . ." (A. 13a).

On April 15, 1971, shortly before the daylight shift change, a machine operator and his foreman working in the "5 face" area of the Gateway mine discovered that the flow of air in that area was 11,000 cubic feet per minute, as compared with a usual air flow of 28,000 cubic feet per minute (R. 15, 18, 59, 64-69). Although the air flow was reduced in this one work area of the mine, there was still an adequate supply of air, which was substantially above the state ventilation requirement of 6,000 cubic feet per minute[3] and the federal re-requirement of 9,000 cubic feet per minute[4] (R. 14-15, 55, 64-67).

The problem was traced to a partial blockage of an intake airway which is believed to have occurred at about 4:30 a.m. on April 15[5] (R. 14, 53, 72). Repairs

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3. Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, (52 P.S. §701-242(b)).

4. Federal Coal Mine Health and Safety Act of 1969, §303 (b) 83 Stat. 742, 30 U.S.C. §863 (b) Art. II, §242 (b).

5. Because of Gateway's policy of providing three to five times the amount of air flow required by state and federal standards and the fact that the remaining four intake airways were unaffected by the partial blockage, the reduction in air flow was not noticed by the three foremen working in the "5 face" area or by their crews (R. 14-15, 19-20, 55, 65-67). No miner complained of coal dust in the air, and the machine operators, union members required by law to check for methane gas every twenty minutes as part of their regular duties, detected no variation from the normal methane level in the mine of two tenths of one percent (R. 17-19, 62-64). Federal law permits methane accumulations of up to one percent when electrical equip-

were made immediately and normal air flow was restored (R. 20, 145-146).

The miners on the first shift, who had been instructed by the Company to stand by on the surface until the repairs were completed, returned to work underground (R. 20). In the interim, however, approximately 100 of the 226 day shift employees disregarded the Company's instructions and went home (R. 20).

Work in the mine proceeded without incident until the following morning when the company refused the union's request for reporting pay for April 15 for those miners who had ignored the company's instruction that they stand by until repairs were completed (R. 20). The company's offer to arbitrate the reporting pay dispute was rejected and the miners struck (R. 21-22).

On April 17, pursuant to a request by the union made after the strike had started over the reporting pay issue, federal and state inspectors visited the mine to determine the adequacy of the repairs (R. 22-23, 152). In the course of this investigation, it was discovered that three third-shift foremen had failed to record any reduction in air volume in connection with the pre-shift examination which each conducted between 5 a.m. and 8 a.m. on April 15 (R. 71, 54). The company suspended two of the foremen pending its own investigation of the matter, but decided against suspending the third foreman because he had reported the trouble (R. 22, 54-55, 83-85).

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ment is being operated. Federal Coal Mine Health and Safety Act of 1969, §303(h), 83 Stat. 742, 30 U.S.C. §863(h). A methane concentration of from five to fifteen per cent is necessary before an explosion in the mine is possible (R. 16-17, 65-67).

On April 18 the Gateway miners held a special meeting, attended by about 200 men, at which the membership was advised about the inspection of the previous day (R. 136-137, 155). The safety committee reported that the state inspector had seized the foremen's records, but the miners were not informed that the mine had been declared safe by both state and federal mine inspectors (R. 155-157). A motion was passed that the members would not return to work unless all three foremen were suspended (R. 141-142, 157).

When notified of the union's position, the company reluctantly agreed to suspend the third foreman who had reported the trouble, pending investigation of the situation, but advised the union that the foremen would be returned to work when their certification status was clarified by the Commonwealth of Pennsylvania (R. 28, 99-102). The company was aware that consideration was being given by the state to the initiation of decertification proceedings, which would mean that the foremen could no longer serve as supervisors in the mine (R. 25, 89-90).

The Gateway miners returned to work on April 19 (R. 24, 112).

Subsequently, a criminal misdemeanor charge was filed against the foremen for failure to properly record air measurements in the mine[6] (R. 52, 56). However, after investigation, the state decided against seeking to decertify the foremen. On May 29, the company received a copy of a letter addressed to the union from the Pennsylvania Department of Environmental Resources

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6. Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, Art. II, §226 (52 P.S. §701-226).

advising the union that in view of the satisfactory record and good performance of the foremen and the pending criminal action, the state had decided that no action should be taken to decertify the foremen and that the "company is at liberty to return the three (3) assistant foremen to work if it so desires" (P. Ex. 2; A. 16a-17a).

The company reinstated two of the foremen (one had retired while on suspension) and scheduled them for work on the midnight shift on June 1, the first regular shift following receipt of the letter from the state (R. 26-29, 90-95). When this occurred, the miners on all three shifts, including those men who worked on the surface, struck the Gateway mine (R. 13-14, 29-30, 106-107).[7] They did not at that time invoke the assistance of the federal and state mine inspectors, both of whom had the power to order the men withdrawn from the mine if they found an imminent danger.[8] Moreover, at no time did the mine safety committee invoke or follow the procedures of the Mine Safety Pro-

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7. The work stoppage at the Gateway mine was soon extended to the Vesta 4, Vesta 5, and Shannopin mines owned by Jones & Laughlin Steel Corporation. These mines were "picketed out" by members of Defendant Local 6330 from the Gateway mine from June 3, 1971 to June 16 1971 when J & L employees returned to work in compliance with a Temporary Restraining Order issued by the District Court in the companion case of *Jones & Laughlin Steel Corporation v. Mine Workers et al,* Civil Action No. 71-566 (W.D. Pa. 1971) (unreported).

8. Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 751, § 104(a) (30 U.S.C. §814(a)); Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, Art I §120 (52 P.S. §701-120).

gram provision of the collective bargaining agreement (A. 10a-13a; App. B, p. 9a).

Gateway immediately notified the UMW of the existence of the work stoppage through the Bituminous Coal Operators' Association, Inc., of which Gateway is a member (R. 30). On June 8, the UMW advised the company that "pursuant to the policy of the organization relative to unauthorized work stoppages, the officers of the district involved have been advised to exercise every effort to have the men involved return to work" (P. Ex. 4; R. 31, 214). On the same date, the company offered to arbitrate, on an expedited basis, the question as to whether the mine was rendered unsafe by the presence of the two foremen in the mine (P. Ex. 6; A. 18a-20a). The union refused to arbitrate (R. 33-34).

When the strike continued, the company filed suit under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185 to compel arbitration of the dispute and to enjoin the strike.

After hearing, the District Court found that the dispute giving rise to the work stoppage was arbitrable under the terms of the labor agreement and that the strike violated the agreement. On the basis of *Boys Markets v. Retail Clerks,* 398 U.S. 235 (1970), it ordered arbitration of the underlying dispute but directed that the foremen be suspended pending the outcome of the arbitration, and enjoined the Gateway employees from continuing their work stoppage (App. A, pp. 1a-4a; App. B, pp. 9a-10a). Thereafter, the impartial umpire ruled that the dispute was arbitrable even though it involved a safety claim; that the position of the Gateway employees in refusing to work with the

two foremen was unfounded; that their presence in the mine did not render the mine unsafe; and that the union safety committee had acted arbitrarily and capriciously in causing the work stoppage (App. G, pp. 29a-51a).

The Court of Appeals for the Third Circuit, in a two-to-one decision, reversed the judgment of the District Court and vacated the preliminary injunction.

The Court of Appeals concluded that the strike at the Gateway mine was not enjoinable because, in its view, the dispute giving rise to the work stoppage was not arbitrable. Despite the extremely broad arbitration clause, the Court of Appeals held that the dispute as to whether the mine would be rendered unsafe by the continued presence of the foremen was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (App. C, p. 16a).

The Court of Appeals refused to apply the strong federal policy favoring arbitration, a view which it said was supported by Section 502 of the Labor-Management Relations Act of 1947. Safety disputes, it concluded, are *"sui generis"*, and public policy "should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C., pp. 16a-18a).

The Court of Appeals also held that this Court's decision in *Boys Markets, supra,* was inapplicable because it involved "an economic dispute, not involving safety" (App. C., p. 18a, n.1).

The Court of Appeals concluded that, under Section 502, the miners themselves were entitled to make

a subjective determination as to what constituted a safety hazard and that it was unnecessary for the union to prove by objective evidence that an abnormally dangerous condition did in fact exist (App. C, pp. 14a, 17a-18a).

Judge Rosenn, dissenting, expressed serious reservations that a good faith safety dispute underlay the strike enjoined by the District Court, but noted that "[w]hatever the probative weight of the evidence the union presented, the majority constructs a test to evaluate the existence of safety hazards which is totally at odds with the commands of both Section 502 and the national policy in favor of arbitration" (App. C. p. 21a). Judge Rosenn indicated particular concern with the majority's failure to require ascertainable, objective evidence that an abnormally dangerous condition for work exists, stating that "[a]cceptance of anything less by a court would be an abdication of its judicial role" (App. C, p. 22a).

Judge Rosenn found that the alleged dispute fell squarely within the language of the arbitration clause of the contract and was not excluded from arbitration by any other provision, and that for a court to order the matter to arbitration was harmonious with the policies underlying the Act and would provide for a final resolution of the dispute not inconsistent with Section 502 (App. C, pp. 23a-24a).

Finally, Judge Rosenn pointed out that "[v]acating the preliminary injunction solves nothing. It restores the parties to the impasse which confronted them in June 1971" (App. C, p. 24a).

SUMMARY OF ARGUMENT

This case raises important questions concerning the interplay between Sections 203(d), 301, and 502 of the Labor-Management Relations Act of 1947 as well as the Federal Coal Mine Health and Safety Act of 1969 and the Occupational Health and Safety Act of 1970.

Peaceful resolution of industrial disputes through arbitration is the keystone of our federal labor policy. The holding of the Court of Appeals that this policy is inapplicable to safety disputes is not only contrary to Section 203(d) but is in direct conflict with the *Steelworkers Trilogy*.

Contrary to the clear dictates of *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), the Court of Appeals ruled that the safety dispute in question was not arbitrable because "it is neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to arbitration" (App. C., p. 16a). Thus, the Court of Appeals established a novel presumption of non-arbitrability for disputes involving safety.

The Court of Appeals claimed to find justification for this presumption of non-arbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947, but this Section does not specifically or by implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view that safety disputes are *"sui generis"* and are to be treated differently than any other kind of grievance dispute.

Summary of Argument.

Arbitration of safety claims is clearly compatible with Section 502, which must be read in *pari materia* not only with Section 301 but also with Section 203(d) of the Labor-Management Relations Act of 1947.

This view is clearly supported by other federal legislation dealing specifically with industrial safety — the Federal Coal Mine Health and Safety Act of 1969 and the Occupational Safety and Health Act of 1970. These statutes contemplate a joint labor-management effort to reduce health and safety hazards, including the use of the grievance-arbitration procedure for resolution of such disputes and third-party determinations as to the existence and severity of claimed safety hazards. These statutes contemplate that safety disputes are to be settled peaceably among the parties without disruptive resort to self help and costly work stoppages.

One of the fundamental errors of the Court of Appeals was in reading Section 502 in isolation, without attempting to harmonize or accommodate its policies to those of Section 203 (d) and 301 or to the subsequently enacted provisions of the two statutes dealing with employee health and safety.

The holding of the Court of Appeals that safety disputes are *"sui generis"* is based upon its erroneous assumption that such disputes are rarely, if ever, arbitrated. There are many reported arbitration decisions dealing with the right of employees to refuse to work under allegedly hazardous conditions. Moreover, although Gateway has never arbitrated a safety issue before, other companies covered by the same agreement have done so. The presumption of non-arbitrability of safety disputes created by the Court of Appeals will pre-

vent the parties from utilizing this means of peacefully resolving such disputes, thereby nullifying the intent of Congress.

Having found that the dispute concerning the foremen was arbitrable and that the June 1 work stoppage violated the labor agreement, the District Court properly enjoined the work stoppage and directed arbitration of the dispute under *Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235 (1970). The Court of Appeals, however, erroneously concluded that *Boys Markets* is limited in its application to economic disputes not involving safety.

While the collective bargaining agreement does not contain a specific no-strike clause, the work stoppage violated the labor agreement since it was over an arbitrable dispute: *Teamster Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962).

The decision of the Court of Appeals also directly conflicts with *Steelworkers v. Enterprise Corp.,* 363 U.S. 593 (1960) in failing to give binding effect to the arbitrator's award on the safety issue. The rationale of the Court of Appeals for ignoring the award was that "there is no sound reason for requiring [employees] to subordinate their judgment [as to the safety of the work place] to that of an arbitrator" (App. C., p. 17a). However, Congress on a number of occasions has legislated that the judgment of employees on matters of safety must be subordinated to that of an impartial third party or tribunal.

The Court of Appeals also erred in holding that the strike of the Gateway miners was protected under Section 502 "because of their good faith apprehension of

physical danger" (App. C., p. 17a). Until the *Gateway* decision, the cases interpreting Section 502 have uniformly held that, to justify a work stoppage over unsafe conditions, the union must present ascertainable, objective evidence that an abnormally hazardous condition did in fact exist. In *Gateway* the Court of Appeals constructed a subjective test for determining whether the work stoppage is entitled to protection under Section 502.

The ruling of the Court of Appeals makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court. Such an interpretation of Section 502 is an open invitation to chaos and instability of labor relations because it will permit a union to create a "safety" dispute as a pretext to justify an illegal work stoppage, as the union did in this case since the safety issue only arose after the dispute on reporting pay occurred.

Finally, it is clear that since the two foremen involved in the dispute worked in the mine on the third shift, the Court of Appeals improperly extended the protection of Section 502 to strikers on the first and second shifts and to those who worked on the surface.

ARGUMENT

I. The Court of Appeals Erred in Holding that the Strong Federal Policy favoring Arbitration of Industrial Disputes does not apply to Disputes alleged to be Over Safety.

The decision of the Court of Appeals that the federal labor policy favoring arbitration of industrial disputes is inapplicable to safety disputes is contrary to Section 203(d) of the Labor-Management Relations Act of 1947 and is in direct conflict with the applicable decisions of this Court interpreting and applying the federal labor policy set forth in this Section of the Act.

A. Peaceful Resolution of Industrial Disputes Through Arbitration Is the Keystone of Federal Labor Policy.

Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In the 25 years since the enactment of Section 203(d), and particularly since the decision in *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957), this Court has formulated an expansive body of federal labor law grounded upon the basic premise of Section 203(d) that industrial stability is best fostered by the substitution of arbitration for industrial strife.

This cornerstone of federal labor policy was most thoroughly expounded in the 1960 opinions of the *Steel-*

workers Trilogy.[9] As was stated in *Steelworkers v. Warrior & Gulf,* 363 U.S. at page 578, n. 4:

> "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *'quid pro quo'* for the agreement not to strike."

When application is made to a federal court for the enforcement of labor agreements under Section 301 of the Act, continued the Court,

> ". . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 282-283.

The presumption of arbitrability set forth in *Warrior & Gulf* has been uniformly applied by the federal courts in the interpretation of collective bargaining agreements — until the instant case.

Faced with the union's assertion that the presence of two foremen in the Gateway mine constituted a "safety hazard", the Court of Appeals erroneously deviated from the clear dictates of *Warrior & Gulf* and established a novel presumption of non-arbitrability for disputes involving safety. Stated the Court, "It is

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9. *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration . . ." (App. C., 16a). Thus, the Court of Appeals ignored this Court's holding in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960) that the federal labor policy set forth in Section 203 (d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

It would be difficult to write a broader arbitration clause than the one involved in this case. It is strikingly similar to the arbitration provision interpreted by this Court in *Warrior & Gulf*. It not only provides for arbitration of differences as to the "meaning and application of the provision of [the] agreement" but also for arbitration of "differences . . . about matters not specifically mentioned in [the] agreement" as well as "any local trouble of any kind [arising] at the mine" (A. 13a; R. 199). As in *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), "[t]here is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration." Moreover, in another section of the contract, the parties specifically agreed that all unresolved disputes, unless national in character, would be settled "by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement . . ." (A. 13a; R. 207).

Thus, the decision of the Court of Appeals failed to give "full play" to the means the parties chose for the resolution of the alleged safety dispute.

B. SECTION 502 OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 DOES NOT REQUIRE A REVERSAL OF THE FEDERAL POLICY FAVORING ARBITRATION WHERE DISPUTES OVER SAFETY ARE INVOLVED.

The Court of Appeals claimed to find justification for its presumption of non-arbitrability of safety disputes in Section 502 of the Labor-Management Relations Act of 1947, which provides in relevant part that:

> ". . . the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act."

It erroneously reasoned that "the strong and explicit legislative mandate that protects work stoppages caused by good faith concern for safety should influence a court to reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C, p. 18a). However, Section 502 does not specifically nor by necessary implication provide that safety disputes are not arbitrable, and there is nothing in the legislative history of the Act to support the view of the Court of Appeals that safety disputes are *"sui generis"* and are to be treated differently than any other kind of grievance disputes. (Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948) 29, 156, 290, 436, 573, 895.) In *Steelworkers v. American Mfg. Co., supra,* this Court said (363 U.S. at 567):

> "Arbitration is an stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement." (Emphasis added)

Argument.

Arbitration of safety claims is clearly compatible with Section 502, which must be read *in pari materia,* not only with Section 301 but with Section 203(d), since all three sections are part of the same chapter of the Labor-Management Relations Act of 1947. As Judge Rosenn aptly observed in his dissenting opinion:

> ". . . section [502] requires a third party, a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition. Since Congress has determined by its enactment of Section 502 that a court may appropriately decide a safety claim, absent language to the contrary, there is no reason to believe that an impartial arbitrator is not equally capable of rendering a similar decision." (App. C, p. 23a)

C. Other Federal Legislation Dealing Specifically With Industrial Safety Supports the Conclusion That Safety Disputes Are to Be Resolved by Peaceful Means Rather Than Economic Warfare.

What the Court of Appeals overlooked is the fact that Congress also has made clear in other federal legislation specifically concerned with problems of industrial health and safety that disputes concerning safety should be peacefully resolved by labor and management through joint labor-management efforts and by arbitration, if necessary, rather than by economic warfare.

The Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Coal Mine Act"), 83 Stat. 742, 30 U.S.C. §801, *et seq.,* and the Occupational Safety and Health Act of 1970, ("OSHA"), 84 Stat. 1590, 29 U.S.C. §651,

et seq. both contemplate a joint labor-management effort to reduce health and safety hazards.[10] They empower federal inspectors to make independent third-party determinations as to the existence and severity of hazards in the work place and to require the removal of employees in the event the hazard is such as could reasonably be expected to cause death or serious physical harm before it can be abated.[11]

It is precisely this type of independent third-party determination which the Court of Appeals felt that employees subject to a possible hazard should not be required to accept because of Section 502. (App. C, 17a).

Perhaps the strongest evidence of congressional policy that safety disputes should be settled peaceably among the parties without disruptive resort to self-help and costly work stoppages is the legislative history relating to the inclusion in both OSHA and the 1969 Coal Mine Act of provisions which permit employees, or their collective bargaining representative, to request inspection of the work place by federal inspectors any time they believe a hazard exists. This provision is contained in Section 8(f)(1) of OSHA (Appendix A, *infra*) and Section 103 (g) of the 1969 Coal Mine Act (Appendix B, *infra*).

Speaking of Section 8(f) of OSHA as enacted, sponsor Senator Williams of New Jersey noted:

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10. Federal Coal Mine Health and Safety Act of 1969, §2(e) (30 U.S.C. §801 (e)); OSHA, §2(b)(1) and (13) (29 U.S.C. §651 (b)(1) and (13)).

11. Federal Coal Mine Health and Safety Act of 1969, §§103, 104 (30 U.S.C. §§813, 814); OSHA §§8, 9, 10, 11, and 13 (29 U.S.C. §§657, 658, 659, 660, and 662).

". . . Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." Leg. Hist. of the Occupational Safety and Health Act of 1970 p. 416 (G.P.O. 1971).

Congressman Steiger of Wisconsin, co-sponsor of the Act with Senator Williams, emphasized that it was not intended that the "inspection upon request" provision be misused by employees or their collective bargaining representatives:

"It is expected that the Secretary will use his good judgment in determining whether there are reasonable grounds to believe that a violation exists and will not permit this procedure to be used as an harassment device." Leg. Hist. of the Occupational Safety and Health Act of 1970, p. 1219 (G.P.O. 1971).

The fear that safety and health legislation might be misused by employees — in contravention of the national labor policy that disputes be settled peacefully — was forcefully expressed several times during congressional debate. In his comments upon an alternative bill (H.R. 16785) which was ultimately rejected by the House, Congressman Michel of Illinois noted:

"If H.R. 16785 passes as is, it will add more fuel to the fire in an already turbulent labor arena. Unions could and would use H.R. 16785 to disregard the no-strike provisions in collective agree-

ments. Further, even if union officers were against a local strike, 'red hot' rank-and-file members could and would disregard their contractual no-strike pledge." Leg. His. of the Occupational Safety and Health Act of 1970, p. 1050 (G.P.O. 1971).

Similar fears were voiced by Congressman Scherle of Iowa immediately prior to the final House vote on the Act. Leg. Hist. of the Occupational Safety and Health Act of 1970, p. 1223-1224 (G.P.O. 1971).

The congressional intent that disputes over safety are to be settled peaceably among the parties, without resort to disruptive work stoppages, is further evidenced by the declared policy of the Occupational Safety and Health Administration, which is charged with the responsibility for administering OSHA, that conciliation between management and labor and utilization of contract grievance procedures should be undertaken to eliminate alleged hazards before federal inspectors are called in by employees or their representative. OSHR, No. 37, pp. 751-752 (BNA January 13, 1973).

In *Steelworkers v. Warrior & Gulf Mfg. Co.*, 363 U.S. 574 (1960) this Court said at page 578:

> "The present federal policy is to promote industrial stablization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

Thus, the intent of Congress as expressed in the 1969 Coal Mine Act and in OSHA that safety disputes are to be resolved by peaceful means is clearly consistent with, and an amplification of, the earlier, more gen-

eral congressional policy that industrial disputes are to be resolved by arbitration. Since many labor agreements now incorporate by reference the terms of OSHA and the Coal Mine Act of 1969 (when applicable), the decision of the Court of Appeals will prevent the parties from using arbitration as a prompt and expeditious means of peacefully resolving disputes which may arise as to the interpretation and application of these important statutes.

One of the fundamental errors of the Court of Appeals was in reading Section 502 in isolation, without attempting to harmonize or accommodate its policies to those of Section 203(d) and Section 301 of the Labor-Management Relations Act of 1947 or the subsequently enacted provision of the 1969 Coal Mine Act and OSHA. Such an accommodation process would clearly have been appropriate: *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970) (Section 4 of Norris LaGuardia Act accommodated to Section 301 of Labor-Management Relations Act); *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co.,* 353 U.S. 30 (1957) (Norris-LaGuardia Act accommodated to Railway Labor Act).

D. THE HOLDING OF THE COURT OF APPEALS THAT SAFETY DISPUTES ARE "SUI GENERIS" AND NOT SUBJECT TO THE ORDINARY PRESUMPTION IN FAVOR OF ARBITRABILITY NULLIFIES THE INTENT OF CONGRESS THAT SUCH DISPUTES BE RESOLVED WITHOUT RESORT TO STRIKES.

In holding that safety disputes are *"sui generis"* and, thus, require a presumption of non-arbitrability, it is apparent that the Court of Appeals assumed that safety disputes are rarely, if ever, arbitrated. This assumption has no basis.

In a review of the arbitration provisions contained in major collective bargaining agreements in effect in 1961-1962, the Department of Labor, Bureau of Labor Statistics, found that out of 1609 agreements studies which contained grievance arbitration provisions, only nine such agreements specifically excluded questions of health and safety from arbitration. Bureau of Labor Statistics, *Arbitration Procedures,* pp. 7, 12 (G.P.O. 1966).[12]

This statistic alone indicates that management and labor alike have recognized the need for rapid and peaceful settlement of disputes concerning the health and safety of the work place.

Equally important is the fact that some labor agreements specifically declare that safety disputes are subject to arbitration[13] — in contrast to the unwarranted assumption of the Court of Appeals that such would be

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12. Out of the agreements surveyed 1,537 contained a no-strike, no-lockout provision of some form. *Arbitration Procedures, supra,* p. 84.

13. In addition, a number of other contracts provide safety and health disputes are subject to the griev-

"the unlikely case." (App. C., p. 18a n.1). Perhaps the most prominent of these agreements is the basic steel agreement between the United Steelworkers of America and the major steel companies. For more than 25 years this agreement has provided in Section 14(c) for the arbitration of disputes concerning grievances of employees "who believe they are being required to work under conditions which are unsafe or unhealthy beyond the normal operations in question." The Steelworkers are the third largest union in the nation, with a membership of approximately 1,200,000. Bureau of Labor Statistics, *National Directory of Unions and Employee Associations, 1971,* Bull. No. 1750, p. 44 (G.P.O. 1972).

The fact that labor and management have traditionally chosen arbitration as the means of effectuating a settlement of safety disputes, either by implication or by explicit language, is also reflected by the large number of reported arbitrators' decisions dealing with a wide variety of safety questions, includng many cases dealing with the right of employees to refuse to work under allegedly hazardous conditions.[14] In some of these

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ance procedure but not compulsory arbitration. See *Arbitration Procedures, supra,* p. 18.

14. The Bureau of National Affairs, *Labor Arbitration Reports,* has a specific key number for arbitration cases dealing with general safety and health disputes (§124.70) and another key number (§118.658), in which cases dealing with discharge or discipline for refusal to work under allegedly hazardous conditions are collected. Similarly, under the topic heading "Safety" the Topical Index-Digest to Commerce Clearing House, *Labor Arbitration Awards,* contains an extensive collection of reported arbitration decisions on safety issues, including many dealing with claimed hazardous working conditions.

cases, the arbitrator, on the basis of objective evidence, found that a hazardous condition existed and ordered that it be corrected.[15] In other cases, using the same test, the arbitrator found that the safety argument was a mere pretext to justify otherwise illegal conduct.[16]

More important with regard to the instant case, however, is the fact that safety disputes have been arbitrated under the very labor agreement here in issue, the National Bituminous Coal Wage Agreement of 1968. As pointed out at p. 16 of the Amicus Curiae brief on the merits on behalf of the Bituminous Coal Operators' Association, Inc., over 40 umpire's decisions relating to safety and health disputes have been reported by BCOA members in the past three years.

This statistic, and the traditional practice of arbitrating safety issues, stands in stark contrast to the unverified statement of the Court of Appeals that the witnesses who testified "did not know of any case in which a disagreement on a safety matter had been handled through arbitration." (App. C. 16a).

We respectfully suggest that examination of the record will indicate there is no testimony as to a safety dispute between the instant parties which *has not* been settled peaceably through the grievance-arbitration procedure. As any person experienced in the field of deep mining knows, the union mine safety committee traditionally reports areas of dispute over health and safety to management, and such disputes are resolved through

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15. *Paragon Bridge and Steel Co.*, 64-2 ARB ¶8441 (Gross, 1964).

16. *Stokley-Van Camp, Inc.*, 60 LA 109 (Karasick, 1973).

the contract procedure daily. Clearly, the fact that no Gateway safety issue has been arbitrated before the present dispute does not establish that such disputes are not arbitrable under the terms of the National Bituminous Coal Wage Agreement.

It should be emphasized that the Court of Appeals' holding that safety disputes are not subject to arbitration cuts two ways. In this case, it means that the employer, Gateway, is powerless to require the Union to arbitrate rather than strike over the dispute concerning the two foremen. However, the decision also means that a union, which has no desire to strike, cannot compel an employer to arbitrate a safety dispute if the employer chooses not to do so, and this may well leave the union without any effective method of remedying the situation. Thus, the conclusion of the Court of Appeals that "a court [should] reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration" (App. C, p. 18a) clearly operates to prevent the parties from utilizing this means of peacefully resolving disputes alleged to be over safety, thereby nullifying the intent of Congress that such disputes be resolved without resort to costly strikes and work stoppages.

II. The District Court Had Authority Under Boys Markets, Inc. v. Retail Clerks to Enjoin a Strike Allegedly Over Safety and to Order Arbitration of the Underlying Dispute.

Having found that the dispute concerning the foreman was arbitrable, and that the June 1 work stoppage over this dispute violated the labor agreement, the District Court properly enjoined the work stoppage and directed arbitration of the dispute, in reliance upon *Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235 (1970).

In the *Boys Markets* case, this Court expressly overruled its earlier decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), and held that a federal court has jurisdiction under Section 301 to enjoin a strike over an arbitrable grievance. It did so because *Sinclair* stood as a significant departure from this Court's "otherwise consistent emphasis upon the congressional policy to promote peaceful settlement of labor disputes through arbitration . . ." (398 U.S. at 241). Viewed in this light, there simply is no basis for the conclusion of the Court of Appeals that *Boys Markets* is limited in its application to "an economic dispute, not involving safety" (App. C., p. 18a, n.1).

The decision of the Court of Appeals is also in direct conflict with the decision of this Court in *Teamster Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962). In the *Lucas Flour* case, this Court held that where, as here, there is a strike over a dispute which is subject to resolution under the arbitration clause of a labor agreement, the work stoppage constitutes a violation of the collective bargaining agreement even when the agreement does not contain an explicit no-strike clause. The Court con-

cluded that "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." 369 U.S. at 105.

Despite the absence of an express no-strike clause in the National Bituminous Coal Wage Agreement, ever since *Lucas Flour,* lower courts have consistently implied an agreement not to strike over arbitrable disputes: *Blue Diamond Coal Co. v. Mine Workers,* 436 F. 2d 551 (6th Cir. 1970); *Old Ben Coal Corp. v. Mine Workers,* 457 F. 2d 162 (7th Cir. 1972); *United States Steel Corporation v. Mine Workers,* 320 F. Supp. 743, 746 (W.D.Pa. 1970); *United States Steel Corporation v. Mine Workers,* 77 LRRM 3134 (E.D. Ky. 1971).[17]

The decision of the Court of Appeals that a strike over a safety dispute is not enjoinable will have a devastating impact on the stability of labor relations. Dissenting Judge Rosenn recognized quite clearly the potential unsettling effect of the majority opinion when he said:

> ". . . If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or

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17. The decisions upon which the Union will rely in support of its contention that the Gateway miners were free to strike, *United Mine Workers v. NLRB,* 257 F. 2d 211 (D.C. Cir. 1958) and *Mile Branch Coal Co. v. Mine Workers,* 286 F. 2d 822 (D.C. Cir. 1961), cert. den., 365 U.S. 871 (1961) were both decided before the *Lucas Flour* case. No court which has considered the question since then has adopted the rationale of these earlier decisions.

court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.' In my opinion, such a rule not only runs directly counter to our national policy of promoting labor stability but opens new and hazardous avenues in labor relations for unrest and strikes." (App. C, p. 22a).

For this reason, the present case is of the utmost importance and concern, not only to Gateway and other signatories to the National Bituminous Coal Wage Agreement, but to all other employers and labor unions. While most labor agreements now contain a provision for arbitration of grievances, relatively few contain a specific provision making safety disputes arbitrable[18] and even in that event, the decision of the Court of Appeals raises serious doubt as to the employer's right to injunctive relief against wildcat safety strikes.[19]

Unless a federal court can enjoin a work stoppage over an alleged safety dispute and order arbitration of

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18. See pp. 25-26, *supra*.

19. The Court of Appeals in the footnote in which it held *Boys Markets* to be inapplicable to safety disputes went on to state:

"It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable." (App. C, p. 18a, n.1)

Hanna Mining Co. v. Steelworkers, 464 F.2d 565 (8th Cir. 1972), while distinguishable on its facts, clearly conflicts in principle with the *Gateway* decision on this issue.

the underlying dispute, as the District Court did in this case on the basis of *Boys Markets,* how are such disputes to be resolved? The answer of the Court of Appeals—that they are to be settled on the picket line—is hardly in keeping with the congressional policy ennunciated in Section 203(d) and is a result neither contemplated by Section 301 nor required by Section 502.

If safety questions are to be so resolved, the outcome necessarily must rest upon the relative economic strength of the combatants. Where the parties' resources are unequal, there is no assurance whatever that the ultimate resolution of the conflict will in any way reflect the socially desirable result of insuring the safety of the employees involved. It is for this reason, among others, that our federal labor policy favors peaceful resolution of safety disputes. Thus, the holding of the Court of Appeals tends to defeat the very purpose it seeks to achieve — the protection of employees from hazards at the work place.

In short, the solution of the Court of Appeals to the problem is really no answer at all.

III. The Decision of the Court of Appeals Conflicts With Steelworkers v. Enterprise Corp. in Failing to Give Binding Effect to the Arbitrator's Decision On the Safety Issue.

In *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960) this Court held that "[t]he federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards."

In the present case, an impartial arbitrator, with extensive experience in mining, determined that the dispute was arbitrable and that there was no safety hazard created by the continued presence of the foremen in the mine (App. G., p. 51a). Nevertheless, the Court of Appeals concluded that the Gateway miners should not be required to accept the arbitrator's resolution of the safety dispute even though the labor agreement provides that "the decision of the umpire shall be final" (P. Ex 1; A. 14a). It paid no heed to the admonition of this Court in *Steelworkers v. Enterprise Corp., supra* at 599, that

> ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his."

The rationale of the Court of Appeals for ignoring the arbitrator's award is entirely unconvincing. It reasoned that:

"[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." (App. C., p. 17a).

What the Court of Appeals completely overlooked is that Congress, on a number of occasions, has legislated that the judgment of employees on matters of safety must be subordinated to that of an impartial third party or tribunal. For example, under Section 104(a) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §814(a), Congress vested federal mine inspectors with the authority to determine whether an "imminent danger"[20] exists such as would warrant issuance of a withdrawal order. In Section 13(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §662, Congress gave the safety inspector, the Secretary of Labor, and ultimately the Court the authority to make a similar third party determination as to the existence of an imminent danger at the place of employment. Finally, even under Section 502 of the Labor-Management Relations Act of 1947, 29 U.S.C. §143, upon which the Court of Appeals placed great emphasis, the

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20. Section 3(j) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §802(j) defined "Imminent danger" to mean "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

National Labor Relations Board and the Court, rather than the employees, must decide whether "abnormally dangerous conditions for work [exist] at the place of employment . . ."

There is no reason to believe that an impartial arbitrator would be any less capable of deciding a safety claim, and, clearly, there is no overriding federal policy that employees need not subordinate their judgment on safety matters to that of an impartial third party. In reality, what the Court of Appeals has done is to set aside the arbitrator's award by substituting its own interpretation of the labor agreement for that of the arbitrator. This disregard of the award directly conflicts with the principle of finality of awards ennunciated by this Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 595 (1960).

IV. The Court of Appeals Erred In Failing To Hold That, Where a Union Relies Upon Section 502 As Justification For a Work Stoppage, It Must Present Ascertainable, Objective Evidence To Support Its Claim of a Good Faith Belief That Abnormally Dangerous Conditions Exist.

The Court of Appeals held that the strike by the Gateway miners was protected activity under Section 502 of the Labor-Management Relations Act of 1947, 29 U.S.C., §143, and not enjoinable "because of their good faith apprehension of physical danger." (App. C., p. 17a).

Until the present case, as Judge Rosenn pointed out in his dissent, the National Labor Relations Board and Court decisions, interpreting Section 502 have uniformly held that, to justify a work stoppage over unsafe conditions, the union must present ascertainable, objective evidence that an abnormally hazardous condition did in fact exist: *NLRB v. Knight Morley Corporation,* 251 F.2d 753 (6th Cir. 1957), *cert. denied,* 357 U.S. 927 (1958); *Philadelphia Marine Trade Association v. NLRB,* 330 F.2d 492 (3d Cir. 1964), *cert. denied,* 379 U.S. 833, 841 (1964). Thus, in *NLRB v. Fruin-Colnon Construction Co.,* 330 F.2d 885 (8th Cir. 1964), it was held that a good faith belief that working conditions were abnormally dangerous is insufficient to establish that a strike was protected under Section 502 unless there was proof of physical facts to support that belief. "What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnor-

mally dangerous' ": *Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961). To the same effect: *Anaconda Aluminum Co.*, 197 NLRB No. 51, 80 LRRM 1780 (1972); *Stop & Shop, Inc.*, 161 NLRB 75 (1966).

The decision of the Court of Appeals represents a clear departure from this previously uniform interpretation of Section 502 by its conclusion that if a union honestly believes a safety issue exists, it has satisfied its burden under Section 502. As dissenting Judge Rosenn pointed out:

> "This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard." (App. C, p. 22a)

Judge Rosenn's observation is borne out, not only by the Court of Appeals' disregard of the arbitrator's award on the disputed issue, but by its refusal to accept the results of investigations conducted by impartial federal and state agencies vested by statute with authority to make third-party determinations concerning mine safety. The federal mine inspector who inspected the mine on April 17 had the authority under Section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §814(a), to issue a withdrawal order if he determined that an imminent danger existed because of the presence of the foremen in the mine. He did not take this action. Similarly, the Commonwealth of Pennsylvania, after an impartial investigation, concluded that decertification proceedings were not appropriate and advised the parties that the company was at liberty to return the foremen to work. These facts were known to the Gateway miners before the strike,

which originally started over a reporting pay dispute, was resumed on June 1.

Thus, the ruling of the Court of Appeals makes the employees the sole judge of whether an abnormally dangerous condition exists and renders their decision unreviewable by the court.

The Third Circuit has had occasion to apply the *Gateway* doctrine in another case arising under the 1968 National Bituminous Coal Wage Agreement. In *United States Steel Corporation v. Mine Workers,* 469 F.2d 729 (3rd Cir. 1972)[21] (Petition for certiorari filed December 27, 1972 at No. 72-930 and still pending) employees at a mine near the Gateway mine went on strike shortly after the District Court in Gateway entered its Temporary Restraining Order in which, *inter alia,* it directed Gateway to suspend the two foremen again pending arbitration of the safety dispute. There the claim was that an assistant mine foreman had failed to "show proper concern for mine safety." In vacating the preliminary injunction entered by the District Court, the Court of Appeals made it crystal clear that its *Gateway* decision stands for the proposition that a subjective, rather than an objective, test must be applied in determining if a work stoppage is entitled to protection under Section 502 when it said at page 729:

> "The entire thrust of [the *Gateway*] decision was that it is the miners themselves who should make

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21. One member of the panel (Senior Judge Layton) concurred only because he felt bound by the majority opinion in *Gateway*. Otherwise he would have dissented for the reasons, among others, advanced by Judge Rosenn in the *Gateway* case.

the determination as to what constitutes a safety hazard."

Such a doctrine, if permitted to stand, is certain to cause chaos and unrest, not only in the coal industry, which is already plagued with more than its share of wildcat strikes,[22] but in all other industries as well. It does not take much ingenuity for a union or its members to create a "safety" dispute as a pretext to justify a work stoppage for some other objective. If the union's assertion that a "safety hazard" exists must be accepted by the court, the sanctity of the arbitration provision and the no-strike pledge will be emasculated, and federal labor policy thereby subverted.

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22. See Amicus Curiae Brief on the merits on behalf of Bituminous Coal Operators' Association, Inc., p. 9.

V. In Any Event, The Court of Appeals Erred In Extending The Protection of Section 502 to Employees Not Physically Located At or Near the Alleged Abnormally Hazardous Condition for Work.

Quite apart from the foregoing, it is clear that the Court of Appeals stretched the scope of Section 502 far beyond its elastic limit.

Although the foremen alleged to constitute the "abnormally dangerous condition" worked in the mine on the third or midnight shift, the protection of Section 502 was extended to strikers who worked on the first and second shifts (the daylight and afternoon shifts, respectively), as well as to those who were employed on the surface rather than underground in the mine.

There is no justification for extending the protection of Section 502 to employees not physically located at or near the allegedly hazardous condition for work, and nothing in the language of this section or in the record of this case suggests that it should have been done here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit should be reversed with instructions to affirm the order of the District Court granting a preliminary injunction and directing arbitration of the underlying dispute.

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APPENDIX A

Section 8(f)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §657(f)(1)) provides:

> "Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination."

APPENDIX B

Section 103(g) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. §813(g)) provides:

> "Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provision of this title."